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Nos. 76-1826, 76-1852, and 76-6978

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT R. LONDON, RUFUS JONES, and JULIUS COTTMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

RICHARD JAMES GENCO, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN SHADE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A.1-A.22)[1] is reported at 556 F.2d 709.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1977. The petition in No. 76-1826 was filed on June 22, 1977, the petition in No. 76-6978 was filed on June 23, 1977, and the petition in No. 76-1852 was filed on June 24, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the application for authorization to conduct electronic surveillance sufficiently established that other investigative techniques had been inadequate or were unlikely to succeed.

2. Whether, in carrying out the court-authorized electronic surveillance of an extensive gambling operation in this case, the government failed to minimize the interception of irrelevant conversations.

3. Whether the failure by the government to record all the intercepted conversations required the suppression of recorded conversations introduced into evidence.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioners London, Jones, and Cottman were convicted of conducting a gambling business, in violation of 18 U.S.C. 1955. Petitioners Genco and Shade were convicted of the same offense following a bench trial in the same court on stipulated facts. Each petitioner was sentenced to a term of imprisonment.[2] The court of appeals affirmed in a comprehensive opinion (Pet. App. A.1-A.22).

In brief, the evidence at each trial established that petitioners London and Genco and unindicted co-conspirator Albert Isella conducted an illegal "numbers" gambling operation, taking lay-off bets from other operators in the Baltimore area. London was the major partner of the operation, and Genco and Isella had lesser, but substantial, interests in the venture. Petitioners Jones, Shade, and Cottman regularly laid off heavily bet numbers to the London enterprise through codefendant Robert Himes, who acted as the clerk and recordkeeper for the operation (Pet. App. A.3).

The government's proof consisted primarily of evidence obtained through court-authorized electronic surveillance, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* In response to an application by the gov-

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[1] "Pet. App." refers to the appendix to the petition in No. 76-1852.

[2] Petitioner London was sentenced to five years' imprisonment; petitioner Jones was sentenced to three years' imprisonment; petitioner Cottman was sentenced to four years' imprisonment; petitioner Genco was sentenced to two years' imprisonment, all but 90 days of which was suspended, to be followed by a probationary period of three years; petitioner Shade was sentenced to one year of imprisonment.

ernment, supported by an affidavit of FBI Agent John D. Huntley, Jr. (Pet. App. A.23-A.44), District Judge Watkins authorized the installation of a pen register device on the telephone in the Himes residence on July 24, 1974. Similarly, based on applications by the government and affidavits submitted by Agent Huntley, District Judges Young and Harvey respectively issued, on August 13, 1974, and September 6, 1974, authorizations to place an electronic listening device in petitioner London's place of business and a wiretap on the Himes telephone.

ARGUMENT

1. Petitioners Genco and Shade contend (Pet. 76-1852, pp. 4-22; Pet. 76-6978, pp. 2-17) that the affidavits supporting the applications for electronic surveillance did not adequately show, as required by 18 U.S.C. 2518(1)(c), either that normal investigative techniques had been tried and had failed or that they were unlikely to succeed. Scrutiny of the agent's affidavits, however, fully supports the conclusions reached by both courts below (Pet. App. A.9) that the authorizing judges were presented with a sufficient showing that ordinary investigative methods were not adequate to discover the full scope of the gambling operation and produce evidence necessary to a successful prosecution.

The affidavits accompanying the surveillance applications stated that, after several months of investigation, government informants who were familiar with the gambling operation through conversations with

some of its principals and customers "refused to testify in open court for fear of their personal safety and that of their families" (Pet. App. A.42). Although the informants provided information on "the roles played by London, Genco, Isella, and Himes [and although] the F.B.I. knew that * * * London's office and Himes' residence * * * were being used to conduct the gambling business," the court of appeals correctly concluded that "the identities of many other participants, including most bookmakers who regularly 'laid off' bets, were not known" (Pet. App. A.6-A.7). The court thus found (*id.*, at A.9-A.11):

> While ample evidence may have been available to arrest and convict this foursome, the government is not precluded from carrying the investigation further. In particular, the government has a valid interest in uncovering the names and locations of various "backers," bookmakers who regularly "lay off" bets and thereby supply the organization with capital. * * * Here, it was vital for the government to uncover the source of the "lay off" bets themselves, professional bookmakers who "fueled" the operation and who would simply find replacements once the four principals were swept away.

The courts of appeals agree that electronic surveillance is permissible when the affidavit shows a factual basis from which the issuing judge can reasonably conclude that such surveillance is necessary to obtain evidence, not only for the successful prosecution of persons known to be involved in the activities under investigation, but for the investigation and prosecu-

tion of "satellite" actors. See, *e.g.*, *United States* v. *Sandoval*, 550 F.2d 427, 429-431 (C.A. 9), petition for certiorari pending, No. 76-6872; *United States* v. *Hinton*, 543 F.2d 1002, 1011 (C.A. 2), certiorari denied *sub nom. Bates* v. *United States*, 429 U.S. 1066; *United States* v. *Daly*, 535 F.2d 434, 438-439 (C.A. 8); *United States* v. *Vento*, 533 F.2d 838, 850 (C.A. 3); *United States* v. *James*, 494 F.2d 1007, 1016 (C.A.D.C.), certiorari denied *sub nom. Jackson* v. *United States*, 419 U.S. 1020; *United States* v. *Pacheco*, 489 F.2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909. Moreover, the issuing judge "is vested with considerable discretion in his analysis." *United States* v. *Sandoval*, *supra*, 550 F.2d at 429.

The affidavits also described "the difficulties inherent in the use of normal law enforcement methods" in this case. See *United States* v. *Hinton*, *supra*, 543 F.2d at 1011. Agent Huntley stated that conventional searches and seizures would be of dubious value in ascertaining the scope of the gambling operation or in establishing all the elements of a violation of 18 U.S.C. 1955, inasmuch as his experience had been that gamblers frequently did not maintain incriminating records and that such records as were kept often were destroyed prior to, or indeed during, a search (Pet. App. A.42-A.43).[3] The affi-

[3] The affidavits also noted that an informant stated that an individual who was making lay-off calls maintained his records on water soluble paper (Pet. App. A.41). Furthermore, several items seized pursuant to searches of petitioners and the gambling premises consisted of records written on "flash paper" (Tr. 564, 597).

davits further noted that it was often difficult to interpret records that were discovered absent a complete understanding of the particular gambling activities involved (Pet. App. A.42-A.43).[4] Agent Huntley also stated that there were no known witnesses who would truthfully testify about the operation and that infiltration of the enterprise by a government agent would be unsuccessful in uncovering evidence regarding involvement of the backers and the lay-off betting portion of the operation because such infiltration could occur only "at the lowest level of the operation * * *" (Pet. App. A.43). Furthermore, it was shown that surveillance of petitioner London's office and Himes' residences had failed to establish anything more than the presence of some of the known participants in the scheme at these locations (see Pet. App. A.30, A.34-A.35, A.37-A.41, A.56-A.58, A.60-A.63). Finally, the affidavits described the crucial role that telephones played in the gambling operation and stated that many important meetings among the prin-

[4] Petitioners contend (Pet. 76-1852, p. 12; Pet. 76-6978, p. 8) that the government had "an immediate opportunity [through normal searches and seizures] to ascertain the identity and location of [the] backers" because of its knowledge that petitioner "Genco regularly carried on his person or in his automobile written records containing numerous backers and the balances due to them or owed by them to the conspirators." But the informant also advised Agent Huntley that this list was coded (Pet. App. A.32). The court of appeals correctly found that this factor, combined with the fact that "gambling records are habitually hidden [and] destroyed in police raids" (*id.* at A.11), supported the conclusion that searches would be unproductive (*ibid.*).

cipals themselves, as well as with some of the backers in the scheme, were held in petitioner London's office (Pet. App. A.24-A.25, A.29-A.31, A.33-A.34, A.36-A.37, A.39-A.41).

The requirements of 18 U.S.C. 2518(1)(c) are satisfied when the application and supporting affidavit, viewed in a practical and commonsense fashion (see S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), sufficiently inform the issuing judge of the difficulties inherent in conventional techniques, so that he can insure that electronic surveillance will be utilized only when traditional investigative techniques will not suffice. See, *e.g.*, *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12; *United States* v. *Hinton*, *supra*, 543 F.2d at 1011; *United States* v. *Robertson*, 504 F.2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913; *United States* v. *Brick*, 502 F.2d 219, 224 (C.A. 8). The applications and affidavits here fully complied with this requirement. Nor were the interceptions here prohibited because "the entire operation could have been identified, located, and brought to an end with normal surveillance" and "by obtaining search and/or arrest warrants" (Pet. 76-1852, pp. 12-13; Pet. 76-6978, pp. 8-9). "Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely" (S. Rep. No. 1097, *supra*, at 101). Congress did not intend "to preclude resort to electronic surveillance until after all other possible means of investigation have been exhausted by investigative agents." *United States* v. *Hinton*, *supra*, 543 F.2d at 1011.

2. Pursuant to the order authorizing the interception of oral communications at petitioner London's business premises, FBI agents monitored conversations at this location from August 24, 1974, through September 12, 1974. The agents intercepted conversations only when one of the three principals of the gambling operation (London, Genco, and Isella) was present, and they did not monitor any conversations of a privileged nature. With the exception of one conversation between petitioner London and an attorney, all conversations at the business premises of London were monitored whenever petitioners London and Genco or unindicted co-conspirator Isella were present. Furthermore, only those conversations which the agents believed to be pertinent to gambling were recorded, so that only approximately 20 per cent of the intercepted conversations were recorded (Pet. App. A.4; Gov. App. 69).[5]

Petitioners London, Jones, Cottman, and Genco contend (Pet. 76-1826, pp. 9-32; Pet. 76-1852, pp. 22-26) that in executing the surveillance order the monitoring agents did not adequately minimize the interception of innocent conversations and thereby violated 18 U.S.C. 2518(5). Petitioners assert that, because of this alleged violation, the evidence derived from the electronic surveillance should have been suppressed.

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[5] "Gov. App." refers to the appendix filed with the government's brief in the court of appeals.

The court of appeals correctly concluded that the government met the requirements of 18 U.S.C. 2518 (5) that "[e]very order [authorizing the interception of oral communication] * * * shall contain a provision that the authorization to intercept * * * shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception * * *." The determination whether there was minimization must be made "on a case-by-case basis, invoking a standard of reasonableness" (Pet. App. A.14). See *United States* v. *Daly*, *supra*, 535 F.2d at 441; *United States* v. *Armocida*, 515 F.2d 29, 42 (C.A. 3), certiorari denied *sub nom. Conti* v. *United States*, 423 U.S. 858; *United States* v. *Quintana*, 508 F.2d 867, 873-874 (C.A. 7). As the court of appeals noted (Pet. App. A.14), this evaluation entails a review of the totality of the circumstances surrounding the interception, with due regard given to the nature and scope of the alleged criminal enterprise under investigation, the government's reasonable expectation as to the content and character of the conversations, and the degree of judicial supervision during the period of surveillance. See also, *e.g.*, *United States* v. *Daly*, *supra*, 535 F.2d at 441-442; *United States* v. *Quintana*, *supra*, 508 F.2d at 874-875; *United States* v. *James*, *supra*, 494 F.2d at 1019-1021. These considerations support the determination by the court of appeals that the government did not violate 18 U.S.C. 2518(5).

In the first place, substantial latitude in the interception of conversations was appropriate here in view

of the size and sophistication of the criminal enterprise under investigation, especially since the purpose of the interception was to learn the identities of all the participants in the illegal undertaking, not just to confirm the involvement of known participants. See, *e.g.*, *United States* v. *Daly*, *supra*, 535 F.2d at 441; *United States* v. *James*, *supra*, 494 F.2d at 1019. As the court below observed (Pet. App. A.15-A.16):

> The government's proof established a far-flung, continuous, criminal operation involving many persons, known and unknown. The purpose of the wiretap was not to ensnare the known principals. The government was primarily (and justifiably) interested in detecting the hidden members of the "lay off" operation—those who supported it and who could be expected to support another if only the principals were successfully prosecuted.

The government was unaware of the identities of all the participants in the scheme and therefore was unable to ascertain in advance whether certain conversations would be relevant. Moreover, the conversations rapidly shifted from innocent to criminal subjects and many of them were in code. In this setting, the court below correctly determined that "anything less than continuous monitoring would [not] suffice" (Pet. App. A.16). Indeed, after a careful review of the tapes of the monitored conversations, the district court found "no broad class of innocent conversations that should not have been intercepted" (Gov. App. 75).

Finally, the authorizing judge required and reviewed periodic reports at five-day intervals during the intercept period, which reports "reflected, *inter alia*, the government's efforts at minimization" (Pet. App. A.17).

Thus, the monitoring agents were shown to have "a high regard for the right of privacy" and they did "all they reasonably could to avoid unnecessary intrusion." *United States* v. *Tortorello*, 480 F.2d 764, 784 (C.A. 2), certiorari denied, 414 U.S. 866.[6]

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[6] Because the minimization requirement was not violated, there is no occasion in this case to address the issue of the appropriate extent of suppression in the event of a violation (Pet. 76-1826, pp. 24-30; Pet. 76-1852, pp. 23-25). We note parenthetically, however, that no court of appeals has ruled that suppression of all overheard conversations is warranted when the government has failed to minimize the scope of interception. See *United States* v. *Cox*, 462 F.2d 1293, 1301-1302 (C.A. 8), certiorari denied, 417 U.S. 918; see also *United States* v. *Principie*, 531 F.2d 1132, 1139-1141 (C.A. 2), certiorari denied, 430 U.S. 905; *United States* v. *Scott*, 516 F.2d 751, 760 n. 19 (C.A. D.C.), certiorari denied, 425 U.S. 917. Moreover, as noted in *United States* v. *Cox*, *supra*, 462 F.2d at 1301:

> * * * 18 U.S.C. § 2517 manifests an intent to utilize *all* the evidence obtained by eavesdropping, and § 2517(5) expressly permits the use in court of evidence obtained by wiretap of a crime other than the crime upon which the court order was premised. Clearly Congress did not intend that evidence directly within the ambit of a lawful order should be suppressed because the officers, while awaiting the incriminating evidence, also gathered extraneous conversations. The nonincriminating evidence could be suppressed pursuant to 18 U.S.C. § 2518(10)(a), but the conversations the warrant contemplated overhearing would be admitted.

3. Petitioners next contend (Pet. 76-1852, pp. 22-26; Pet. 76-1826, pp. 17-32) that the recorded conversations introduced into evidence should have been suppressed because the government failed to record all intercepted conversations. There is no merit to this argument.

Although the decision of the monitoring agents to record only those intercepted conversations relating to gambling was a departure from the command of 18 U.S.C. 2518(8)(a) that "[t]he contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded * * *," the court of appeals correctly held that suppression of the intercepted evidence was not warranted (Pet. App. A.19). See *United States* v. *Daly*, *supra*, 535 F.2d at 442; *United States* v. *Doolittle*, 507 F.2d 1368 (C.A. 5), affirmed *per curiam*, 518 F.2d 500 (C.A. 5) (*en banc*), certiorari denied, 430 U.S. 905.

Title III prohibits the use at trial of the contents of any intercepted evidence "if the disclosure of that information would be in violation of this chapter." 18 U.S.C. 2515. In turn, 18 U.S.C. 2518(10)(a) provides that disclosure is unlawful if: "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval." See *United States* v. *Giordano*, 416 U.S. 505, 524-225.

Petitioners do not contend that the authorizing order was insufficient on its face or that the failure to record all the conversations was in derogation of the order. Their argument, rather, is that failure to record certain interceptions renders unlawful the interception of other conversations actually recorded. The court of appeals correctly rejected this contention (Pet. App. A.17-A.21).

Not every violation of the wiretap statute renders interceptions unlawful and subject to suppression. *United States* v. *Chavez*, 416 U.S. 562, 574-575. "[S]uppression is required only for a 'failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'" *United States* v. *Donovan*, 429 U.S. 413, 433-434 (quoting from *United States* v. *Giordano*, 416 U.S. 505, 527).

As in *United States* v. *Donovan*, *supra*, 429 U.S. at 437, "nothing in the legislative history suggests that Congress intended [the recordation of all interceptions] to play 'a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance.'" The court of appeals reviewed the legislative history of 18 U.S.C. 2518(8)(a) and concluded (Pet. App. A.20):

> The recording provision * * * was enacted to serve an evidentiary function. Congress apparently realized that testimony by monitoring agents of what they heard would be open to attack on grounds of hearsay, failure of recollection and bias. Tape recordings, on the other hand, would be the best evidence and would be almost irrefutable if their authenticity and physical integrity were guaranteed. Accordingly, intercepted communications were to be recorded, if at all possible, and introduced in their recorded form.[7]

In short "[n]othing in the structure of the Act or this legislative history suggests that incriminating conversations are 'unlawfully intercepted'" (*United*

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[7] Petitioners' claim that they were prejudiced by the failure to record all the intercepted conversations because this resulted in "an edited record" (Pet. 76-1826, p. 31; Pet. 76-1852, p. 25) is insubstantial, as they "do not allege or demonstrate that any of the recorded communications were distorted or taken out of context" (Pet. App. A.21, n. 8). Furthermore, contrary to petitioners' assertion, nonrecordation did not affect the ability of the court of appeals to review their claim of failure to minimize nonpertinent conversations (Pet. 76-1826, pp. 22-23; Pet. 76-1852, pp. 24-25). The court was aware of the method of recording by the agents and the types of conversations not recorded (Gov. App. 82-92). Moreover, if petitioners felt that they were hampered in their efforts to question the adequacy of minimization because the number, type, and duration of nonpertinent overheard communications were not evidenced by tape recordings, they could have availed themselves of the detailed logs which were maintained by the monitoring agents during the period of interception. These logs noted, almost from minute to minute, the individuals entering or leaving petitioner London's office, as well as each time the recording device was started or stopped, and they contained brief statements regarding the overheard conversation and whether or not it was being recorded (*ibid.*).

States v. *Donovan*, *supra*, 429 U.S. at 438) whenever other intercepted conversations are not recorded.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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